

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
COLIN HALPERN	:	DETERMINATION
for Redetermination of Deficiencies or for Refund of New	:	DTA NOS. 814245
York State and New York City Personal Income Taxes	:	AND 814246
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Periods September 1,	:	
1989 through December 31, 1989 and June 16, 1990	:	
through June 30, 1990.	:	

Petitioner, Colin Halpern, 16 Woodland Road, New City, New York 10956-2626, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the periods September 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 20, 1996 at 1:15 P.M., with all briefs to be submitted by March 24, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Wayne P. Hickey, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over income taxes withheld by Courter & Company, Incorporated from the wages of its employees, and, if so, whether he willfully failed to do so.

FINDINGS OF FACT

The Division of Taxation ("Division") issued two notices of deficiency, each dated July 6, 1993, against petitioner Colin Halpern asserting penalty due of \$51,148.30 and

\$90,084.46 for the periods September 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990, respectively. Each of the notices stated that it was issued to petitioner, under Tax Law § 685(g), as an officer/responsible person, for a penalty equal to the tax not paid by Courter & Company, Incorporated.

Prior to and during the periods in issue, Courter & Company, Incorporated ("Courter") was a mechanical contractor offering plumbing services to public utilities, cogeneration facilities and public and private sector construction projects.

Courter, established in 1937, was acquired by NPS Technologies Group, Inc. ("NPS") in the early 1980s as one of its wholly-owned subsidiaries.

Throughout the early 1980s, NPS and its subsidiaries' focus was directed towards the nuclear energy field.

In August 1986, NPS made a public offering of its common stock. Petitioner beneficially owned approximately 51% of the outstanding shares of NPS, while approximately 47% of the remaining outstanding shares were owned by outside investors. During the periods in issue, petitioner was chairman of the board of directors, president and chief executive officer of NPS.

By the mid-1980s, the nuclear power generation industry was in decline and NPS was unable to obtain profitable replacement contracts. NPS and its subsidiaries suffered economic reversals. In addition, by late 1987, NPS's primary lender reduced its line of credit substantially. In order to survive, NPS rethought its overall marketplace strategy, disposed of five of its subsidiaries and focused on engineering software development, mechanical contracting and the construction services business. During 1988, NPS streamlined both its operations and those of Courter through reductions in manpower and "occupancy costs".

During the periods in issue, Courter continued to be wholly owned by NPS and was its principal and only operating subsidiary. The executive offices of both NPS and Courter were located at 25 Chobot Lane, Elmwood Park, New Jersey.

During the periods in issue, petitioner was Courter's president and Sheldon Marchasin was its executive vice president. Petitioner's brother, Gerald Halpern was Courter's vice president until his April 1990 resignation.

Petitioner did not appear at the hearing in this matter; rather, his representative submitted Mr. Halpern's unsworn statement signed on June 21, 1996,¹ which, in pertinent part, set forth the following:

"1. During the periods in question, I was the president of NPS Technologies Group, Inc. the parent corporation of Courter & Company, Inc., the corporation for which I am being held as an 'alleged' responsible party for non payment [sic] of withheld income taxes under Section 685(g) of the New York State Tax Law.

"During this time period I was also an officer in many other companies. . . . Due to the complexities of all these businesses I did not supervise day to day [sic] operations of any of these companies.

"2. I did not sign any of the withholding forms when filed. I did not at any time, willfully not pay New York State and New York City withheld income taxes. The reason for non payment [sic] of the taxes was due to financial difficulties of the company, caused by inherent problems of the industry Courter & Company, Inc. operated in.

"3. In as much [sic] as all the companies of the group, were in severe financial condition, my efforts were not directed toward day to day [sic] operations of any company, but rather salvaging any business opportunities while downsizing the active companies and dealing with the legal and financial difficulties of closing down unprofitable subsidiaries. At the same time I had to explore new markets for continuing operations, new business objectives and the overall continuance of the NPS Technologies Group, Inc., as a whole. Each of the various business [sic] in the group had capable management in place to handle day to day [sic] operating decisions.

"4. . . . My efforts for this company [Courter] were two fold [sic]. My main efforts were focused on saving the current projects from termination by owners or general contractors. The company lost in excess of 6.5 million dollars in 1986, 87 & 88 and did not have the required capital necessary to complete certain work.

"5. I had no say in the day to day [sic] operations of Courter & Company, Inc. I did not hire or fire employees, did not attend job meetings, decide which creditors would be paid or not paid, did not sign checks of the company or receive any remuneration from the company. Other than what I previously stated I had no knowledge of and control over the financing affairs of the company."

¹Although the document was characterized as Colin Halpern's affidavit, it is an unsworn statement, not an affidavit which by definition is a sworn statement.

Attached to petitioner's statement was a list of 62 companies in which petitioner allegedly held corporate office. It is noted that, by the periods in issue, some of the 62 companies of which petitioner alleges he was an officer, had either ceased operations or had been sold off.

The only witness to testify on petitioner's behalf was his representative, Wayne Hickey, CPA. During the periods in issue, Mr. Hickey was one of the independent accountants for both Courter and NPS. According to Mr. Hickey, petitioner, at that time, focused on the general financial viability of the companies, rather than the day-to-day operations of any individual corporation. Mr. Hickey stated that he observed that individuals other than petitioner handled Courter's daily operations, and therefore petitioner was not a responsible officer of Courter. On cross-examination, Mr. Hickey admitted that he did not attend all of Courter's business meetings and that he was not involved in all of its business affairs. He also admitted that petitioner had authority to hire and fire the people petitioner chose to run Courter.

As a result of the downsizing mentioned in Finding of Fact "6", Courter had "a permanent staff of project management and supervisory personnel"; however, it hired the majority of its employees including "technicians and craft employees" on a temporary basis for its projects. The exact number of individuals employed by Courter during the periods in issue is not specified in the record.

Petitioner, as Courter's president, signed franchise tax returns, applications for extensions for filing tax returns, business tax surcharge reports and refund claims.

The record is silent as to how many checking accounts Courter had. Petitioner submitted checks drawn on Courter's National Community Bank of New Jersey checking account for the months of December 1989 and December 1990 as representative of Courter's daily business transactions. This account was used for general business purposes, as well as for the company's payroll. Petitioner signed a small number of checks in each of the representative months, including one in December 1989 payable to himself in the amount of \$5,000.00.

Review of the Form 10-K filed with the Securities and Exchange Commission for the

years 1988 through 1990 reveals that NPS and its subsidiaries were in arrears to various Federal and state agencies for payroll taxes due in the years 1987 through and including 1990. By the end of 1990, the payroll taxes in arrears totaled \$1,025,000.00.

During the periods in issue, NPS and Courter were providing "additional guarantees for amounts being paid to creditors by a bonding company on behalf of a discontinued subsidiary."

Petitioner submitted an affidavit, sworn to on February 18, 1993, to the Division's Tax Compliance section. In that affidavit, petitioner stated that he was an officer of Courter during the years 1989, 1990 and 1991 and that he "may be responsible for the trust fund portion of the employment taxes owed" by Courter to New York State.

During the periods in issue, petitioner and his wife were personal guarantors of Courter performance bonds aggregating approximately \$500,000.00.

At some point Courter ceased operations; the record is silent as to when that occurred.

After a Bureau of Conciliation and Mediation Services ("BCMS") conciliation conference, the conferee issued a Conciliation Order (CMS No. 133796), dated June 2, 1995, sustaining the statutory notice (Notice number L007549255) for the period September 1, 1989 through December 31, 1989. The following note appeared at the bottom of this conciliation order "[A]s a result of the Conciliation Conference, there are no payments applied to this Notice."

After the same BCMS conciliation conference, the conferee also issued a Conciliation Order (CMS No. 134128), dated July 7, 1995, recomputing the statutory notice (Notice number L007549256) from \$90,084.46 to \$75,084.46 for the period June 16, 1990 through June 30, 1990.

On August 25, 1995, petitioner filed two petitions challenging the notices of deficiency in the amounts of \$51,148.30 and \$75,084.46, respectively, for the periods September 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990, respectively. In both petitions, petitioner asserted that the Commissioner erred in determining that petitioner was

responsible for Courter's withholding taxes. He contends that even though he was a corporate officer, he was not responsible for the disbursement of funds nor did he decide which creditors would be paid. He further asserts that he was not responsible for nor did he willfully fail to pay withholding taxes. Petitioner also challenged the validity of the Notice of Deficiency issued for the period September 1, 1989 through December 31, 1989 on the ground that the statute of limitations had expired three months prior to the Division's issuance of the notice.

CONCLUSIONS OF LAW

A. Petitioner appears to have abandoned the claim that the statute of limitations had expired prior to the issuance of the Notice of Deficiency for the period September 1, 1989 through December 31, 1989. Petitioner has not submitted any evidence on this issue or addressed it in either of his briefs. Therefore that issue is deemed to be abandoned and will not be addressed in the conclusions of law. (See, Matter of Clayton, Tax Appeal Tribunal, November 5, 1992.)

B. Tax Law § 685(g) provides:

"Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payments thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(n), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

"[T]he term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

C. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, inter alia, whether the particular individual signed tax returns, derived a substantial part of

his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; see, Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272, 273; see, Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799, 801).

D. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Chin, Tax Appeals Tribunal, December 20, 1990). In addition, and unlike the sales and use tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), the test is:

"whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required" (id., 396 NYS2d at 624-625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

In addition, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

E. The burden of proof is on the taxpayer to prove that a tax assessment is improper (Tax Law § 689[e]). Petitioner asserts that he was not a "responsible party" as determined by the Division and that he did not willfully fail to pay over withholding taxes for the periods in issue. He claims that he did not unreasonably or recklessly delegate his responsibilities in order to insulate himself from responsibility. Rather petitioner describes this as a case of "big business in operation." He maintains that he is an entrepreneur who spends his time acquiring new companies and pursuing business ventures which generate income and add value to his business groups. He contends that it was physically and mentally impossible for him to be involved in the daily operations of all the businesses which he controlled. Petitioner asserts that he places capable managers in charge of the companies he acquires and that the managers are solely responsible for all aspects of the companies' business operations. He maintains that even though he was Courter's president, he was not involved in any aspect of its daily business operations, including the hiring and firing of employees and control over Courter's finances.

F. It is clear from the circumstances surrounding Courter's business operations that petitioner was a person under a duty to collect and pay over the withholding taxes on behalf of Courter. Petitioner's argument that he did not exercise control over Courter's financial matters is without merit. Petitioner was able to control Courter through his beneficial ownership of 51% of the outstanding shares of NPS, a publicly traded corporation, which wholly owned Courter. He was Courter's president, as well as the president, chairman of the board and chief executive officer of NPS, Courter's corporate parent. As Courter's president, he had the authority to hire and fire employees. Additionally, because of the positions he held in NPS, as well as his ownership of the controlling interest in NPS, petitioner had the ability to control Courter's overall financial viability and the size of its permanent staff. Petitioner also signed corporate checks and tax returns on behalf of Courter. He and his wife personally guaranteed Courter performance bonds. The record clearly establishes that petitioner had the ability and authority to control Courter's business affairs.

G. It having been found that petitioner was a person under a duty to collect, truthfully account for and pay over such withholding taxes, it must then be determined whether his failure to do so was willful. The crux of petitioner's argument is that he is an entrepreneur who placed capable managers, Messrs. Marchasin and Halpern, in charge of Courter and that they were responsible for all of Courter's business operations, including the filing of corporate returns and payment of its tax liabilities

The fact that one is determined to be a responsible officer does not necessarily mean that the person is liable for the taxes in issue (see, Matter of Lyon, supra). The crux of the willfulness standard "is that the person must voluntarily and consciously direct the trust monies from the State to someone else" (Matter of Gallo, Tax Appeals Tribunal, September 9, 1988). Therefore, a lack of knowledge that withholding taxes were not being paid over at the time of the failure would negate a finding of willfulness (Matter of Gallo, supra; Matter of Flax, Tax Appeals Tribunal, September 9, 1988; Matter of Lyon, supra.) Nevertheless, a person's failure to withhold and pay over the tax has been held to be willful, notwithstanding his lack of knowledge, because the person disregarded his corporate responsibilities including the responsibility to see that taxes were paid (Matter of Capoccia, 105 AD2d 528, 481 NYS2d 476; Matter of Ragonesi v. New York State Tax Commn., supra; Matter of Flax, supra).

The Tribunal has held that a responsible officer can make a reasonable delegation of authority (Matter of Lyon, supra). In Lyon, the record indicated that the officer to whom fiduciary responsibilities had been delegated was experienced in running the corporation. In addition, the petitioner in that case kept himself informed as to the corporation's operations through regular meetings with such officer and also hired an outside professional, an accountant, to prepare and file corporate tax returns. I find that petitioner did not prove that, as a responsible officer, he made a reasonable delegation of authority to ensure that the withholding taxes were paid. While the Form 10-K submitted does identify three of Courter's corporate officers, petitioner and Messrs. Marchasin and Gerald Halpern, it does not outline

what each individual's responsibilities were vis-a-vis Courter. Other than a vague reference in his unsworn statement to capable management, petitioner has not identified to whom he delegated his duties with respect to Courter's withholding tax responsibilities. Nor has he identified anyone on whom he relied within Courter. Assuming petitioner had, in fact, delegated his duties with respect to Courter's withholding tax responsibilities to Messrs. Marchasin and Halpern, he has not demonstrated that it was reasonable to rely on these individuals (Matter of Lyon, supra). Furthermore, petitioner could not have delegated any responsibilities pertaining to Courter to Gerald Halpern after Mr. Halpern's April 1990 resignation as vice president.

It is clear from the record that petitioner was aware that NPS and its various subsidiaries were having problems with respect to their withholding tax responsibilities on the Federal and state levels as early as 1987 and that he was also aware of the substantial losses which Courter had sustained prior to the periods in issue. However, there is no evidence that petitioner took any steps to ensure that Courter was meeting its State withholding tax obligations. It appears that petitioner was more concerned with the overall financial survival of his business empire rather than with his duties as president of Courter. Petitioner's cavalier attempt to absolve himself from his fiduciary responsibility by placing the blame on unnamed management cannot and does not preclude a finding that his failure to collect and pay over the withholding taxes on behalf of Courter & Company, Inc. was "willful" within the meaning and intent of Tax Law § 685(g) (see, Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., supra).

H. The petition of Colin Halpern is denied, and the notices of deficiency dated July 6, 1993, as modified by Conciliation Order (CMS No. 134128), dated July 7, 1995, are sustained.

DATED: Troy, New York
July 24, 1997

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

